No. 22,560

IN THE

United States Court of Appeals

For the Ninth Circuit

PSG Co., a corporation,
and Philip S. Greenberg,
Appellants,
vs.
Merrill Lynch, Pierce,
Fenner & Smith, Inc.,
Appellee.

Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni, Judge

APPELLANTS' REPLY BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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Appellants PSG Company and Philip Greenberg submit herewith their reply to the various points made in the brief of appellee Merrill Lynch:

1. **Statement of Issues.** Under this heading Merrill Lynch's brief (pp. 1-2) recites its version of the issues raised by Greenberg's appeal.

ANSWER: Appellee's version of the issues differs considerably from the issues actually raised by appellants, as outlined plainly and simply in our open-

ing brief at p. 5, namely: the trial court erred in denying Greenberg (a) his right to a jury verdict on the merits of his case, (b) his right to introduce evidence on punitive damages, and (c) his right to introduce evidence of Merrill Lynch's violation of the Robinson-Patman Act. To the extent that appellee Merrill Lynch discusses its own version of the issues it misses the point of our appeal.

Appellee's brief here repeatedly states, in varying phraseology, without transcript reference, that the issues center about Greenberg's alleged right "to place orders for new sugar futures contracts" (p. 2). This is not so. There would have been no lawsuit had that been the issue. The true issue was, and is, Greenberg's right to protect his *old* business, that is, his "position" on the day in question, with some 587 futures contracts pending between the parties (appellee's brief, p. 10), worth between two and three million dollars (Pretrial Rep. Tr. p. 94). It was imperative to protect those pending contracts by subsequent buy and sell orders, depending upon subsequent market developments, as was admitted by Merrill Lynch itself (Rep. Tr. pp. 212-213, 61-62). See *Volkart v. Freeman,* 311 F. 2d 52, 55. ALL THE ORDERS REFUSED BY MERRILL LYNCH ON OCTOBER 22ND WERE ORDERS BY GREENBERG PROTECTING HIS "OLD" POSITION (Rep. Tr. pp. 100, 245). Involved here is *not* "new business"!

2. **Statement of the Case.** Under this heading (pp. 3-11) Merrill Lynch recites its statement of this case.

ANSWER: With enviable insouciance appellee dismisses our statement of the case as "inaccurate and incomplete", without enlightening us in any way as to alleged deficiencies; appellee then proceeds to give us its carefully culled selection of the "facts".

Unlike the usual appeal, however, we are not concerned on this appeal with the evidence that might support appellee and the judgment; we are concerned with the evidence contra the judgment, since the trial court took the case from the jury. *Lucero v. Donovan* (9th Cir.) 354 F. 2d 16. The evidence favoring Greenberg is recited in our opening brief, with each item carefully cited to the record. The failure of appellee to attack the same is a reasonably clear admission of its validity. It is the evidence ignored by appellee which is significant and compels a reversal, *not* the evidence recited by appellee.

3. **Obligation to take orders.** Merrill Lynch contends (p. 3) it was not "obligated in any way to continue to place orders to purchase or sell sugar future contracts for Greenberg."

ANSWER: This statement does correctly describe the real issue here. Merrill Lynch contends it was under no obligation to take orders of any kind, though at the time there were some 587 contracts pending between the parties, compelling the actual delivery of tens of thousands of tons of sugar in the future, had no further orders been executed. To state the

contention is to demonstrate its error. At least at the time in question Merrill Lynch purported to permit liquidating orders, though the facts showed that even liquidating orders were refused (Rep. Tr. pp. 60-61, 194, 197, 200) and pending unexecuted orders were cancelled by Merrill Lynch (Cl. Tr. p. 57, l. 15).

4. **Robinson-Patman Claims.** Merrill Lynch states (p. 4) that Greenberg in the pretrial order did not make any contention against Merrill Lynch under the Robinson-Patman Act.

ANSWER: This claim was not in the pretrial order because the court refused to include it in the pretrial order (Cl. Tr. p. 72), though application therefor was made considerably before pretrial (Cl. Tr. p. 424 et seq.). This is the very error raised by this appeal.

5. **Time to liquidate.** Merrill Lynch states (p. 4) that "Greenberg's testimony was that a reasonable time to liquidate had been given (Tr. 269)."

ANSWER: The transcript reference is to a comment of the court; Greenberg's position is somewhat to the contrary.

6. **Declination of orders by broker.** Appellee states (p. 5) that Greenberg's expert testified that a broker can decline to accept employment at any time.

ANSWER: This statement is an example of the fundamental error running throughout appellee's brief, namely, the citing of evidence favorable to it and ignoring unfavorable evidence. The pertinent facts are that Greenberg's expert testified (Rep. Tr.

pp. 131-132) that it is the custom of the trade to give reasonable advance notice to the customer of any change in policy. Also of considerable import is Merrill Lynch's own admission that it *could not* have done what it did if Greenberg had not been notified beforehand (Rep. Tr. p. 214).

7. **Grounds of the decision.** Merrill Lynch states (p. 5) without one single citation to the record, a number of "conclusions" of the court concerning factual issues in this case.

ANSWER: As noted in our opening brief, no findings of fact or conclusions of law were made by the court in this case, so that Merrill Lynch, in purporting to recite the court's conclusions, presumes much. For example, Merrill Lynch would have us believe (p. 5) that the court held that "the evidence of damages based on loss of future profits was purely speculative"; yet the court itself stated it "couldn't even get to the point of damages" (Rep. Tr. p. 271).

8. **Promissory estoppel.** Merrill Lynch concedes (p. 5) that the court found that Merrill Lynch could be bound, under promissory estoppel, by its promise to take Greenberg's business up to 300 contracts open, but that this promise "could be terminated in accordance with the custom of the trade, and there was no evidence that they were terminated in any other way."

ANSWER: Again, appellee ignores unfavorable evidence that termination here was directly contrary to the custom of the trade. See Rep. Tr. pp. 92, 95, 131-132, 191, 214.

9. **Merrill Lynch's income.** Merrill Lynch states (p. 6) that its income is derived *solely* from commissions, citing R. 50.

ANSWER: The cited reference is to one of the agreed facts in the pretrial order, that "Merrill Lynch derives income from its commodity operation from commissions." Appellee gratuitously supplies the word "only". In the trial court Greenberg offered to prove that Merrill Lynch, through its chain of foreign subsidiaries, derives income from its commodity operations *as a principal,* and, through that device, it was taking the other side of Greenberg's orders in violation of the Robinson-Patman Act. See this point at our opening brief, p. 24; this is *not* answered in appellee's brief.

10. **Exclusive brokerage.** Appellee states (p. 7) that Greenberg never told Merrill Lynch that he would not trade with any other broker.

ANSWER: Greenberg testified as follows: "I told them I would be their customer, they would have all my business and they would be aware of it" (Rep. Tr. p. 187).

11. "**Paper profits**". Merrill Lynch states (p. 10) that the "paper book value" of the refused orders would have appreciated by $45,821.00 during the time in question.

ANSWER: The evidence was that this sum was the actual cash Greenberg was entitled to demand from Merrill Lynch (Rep. Tr. pp. 11-15).

Merrill Lynch seems to suggest that the customer's sole function is to *pay* the broker (commissions and margins), never to *receive* money from the broker until the specific contract has been closed out. The fact, however, is that, each day, the customer if he wishes will receive payment from the broker of his equity (difference between value of all his contracts on that day and his margin requirements). See Rep. Tr. pp. 11-15.

12. **"Magic words"**. Merrill Lynch states (p. 13) that Greenberg's argument here is simply that judgment must be reversed because Merrill Lynch did not use the "magic words" of "motion for directed verdict" instead of "motion for dismissal".

ANSWER: Merrill Lynch seems to have attached some significance to the "magic words" in reciting, in the form of judgment it submitted to the trial court, that a "motion for directed verdict" had been made (Cl. Tr. p. 87), when, in fact, no such motion had been made. Be that as it may, our argument does not depend on any "magic words". Our argument, simply, is that a motion to dismiss has not been available in jury cases since the 1963 amendment to Rule 41 (b) F.R.C.P.

Appellee argues that the two motions are interchangeable citing *Wolf v. Reynolds,* 304 F. 2d 646 and *Carroll v. Seaboard,* 371 F. 2d 903. The first case was decided before 1963; in the second case the court without discussion, treated a motion to dismiss as a motion for directed verdict, citing as its authority Notes of Advisory Committee on Rules under Rule

41 (b) 28 U.S.C. The cited note reads in part, as follows:

> "Accordingly, the second and third sentences of Rule 41 (b) are amended to provide that the motion for dismissal at the close of plaintiff's evidence shall apply *only to non-jury* cases." (Emphasis added).

The importance of the point goes far beyond technicalities. As we have seen, appellee's brief is filled with flat statements of what the trial court supposedly "determined" or "found" or "concluded" as to the facts. Appellee repeatedly gives us, in supposed support of the judgment, its interpretation of the trial court's "thinking" or "reasons", citing, sometimes correctly, remarks of the trial court concerning *factual issues*. Treated as a motion for dismissal (which it was), the judgment falls for lack of findings; treated as a motion for directed verdict (which it was not) the judgment falls because the trial court in a jury case cannot dispose of factual issues raised by the evidence. That evidence was detailed in our opening brief and is largely ignored in appellee's brief, as noted above.

13. **"Scintilla" rule.** Merrill Lynch vigorously attacks (p. 15 et seq.) the notion that a case must go to the jury if there is a "scintilla" of evidence to support a verdict.

ANSWER: We made no such contention.

14. "**Terminable at will**". Merrill Lynch, without citing to the record, states (p. 16) that "the district court correctly determined that under familiar principles of agency law the relationship between Greenberg and Merrill Lynch was terminable at will."

ANSWER: Again, this is Merrill Lynch's interpretation of what the trial court "determined" on this important factual issue. The trial court said, at Rep. Tr. p. 269:

> "Looking to the customs of the trade, it doesn't seem to help us very much. We learned that when the limits are reduced, a reasonable amount of time is given to liquidate; and indeed such reasonable time was given in this case."

We have heretofore detailed the evidence to the contrary.

15. **Pending transactions.** Merrill Lynch cites (pp. 16, 17) Meyer, *Stockbrokers and Stock Exchanges,* pp. 263, 264, for the rule that no notice is necessary "if there are no transactions pending between the broker and the customer at the time."

ANSWER: Here, there were 587 transactions pending between the broker and the customer at the time. (Appellee's brief, p. 10). Secondly, *pending unexecuted orders were cancelled by Merrill Lynch* (Cl. Tr. p. 57, l. 15; Ex. 72 October 22, 1965).

16. **Obligations of stock broker.** Merrill Lynch cites (pp. 18, 19) authorities for the rule that a *stock broker* is not required to accept new business.

ANSWER: The inapplicability of these citations is clear: a *stock* transaction is completed and closed

upon execution of the order to buy or sell; in a commodity transaction the heavy obligation of the broker to his customer, to the Exchange, to the other party to the contract, may run on a year or more thereafter, as we pointed out in our opening brief (pp. 16-17), without reply by appellee. See Exchange Rules, Ex. 59, 149 and see *Volkart v. Freeman,* 311 F. 2d 52, 55, 56. Involved here are *futures* transactions which are simply *started* by the order to buy or sell. Thus, authorities for the rule that a *stock* broker's responsibilities end with execution of the order are inappropriate.

17. **"Reasonable liquidation"**. Merrill Lynch states (p. 20), without citation to the record, that "Greenberg testified that Merrill Lynch had not forced him to liquidate and had given him a reasonable time to reduce his accounts and transfer his contracts to his new broker."

ANSWER: It is apparent why appellee does not cite this statement to the record, for no citation could be given.

18. **Evidence of agreement.** Merrill Lynch states (p. 21 et seq.) that Greenberg expressly conceded there was no evidence of an agreement obligating Merrill Lynch to accept his orders, citing TR 251.

ANSWER: The transcript reference does not support appellee's statement. At the cited reference Greenberg's counsel stated he was not contending, "that there may have been some quid pro quo offered by way of a bilateral promise". This is a long way from saying there was no agreement!

Merrill Lynch seems to argue that there must be some *separate* payment or other consideration paid for any promise of a future act before that promise is binding. It argues that when Greenberg's counsel freely admitted there was no such *separate* consideration paid for Merrill Lynch's promise, Merrill Lynch was free to claim its promise was only "pretend" and unenforceable. One wonders if Merrill Lynch's thinking along these lines should not be more fully advertised to its customers—beforehand.

The contention is analogous to arguing that the automobile manufacturer's promise of future service to the customer under its warranty is unenforceable unless the customer can show a separate payment for that warranty. To state the argument is to demonstrate its fallacy.

Merrill Lynch concedes (p. 22), even under its theory, that "consideration" may be found where one of the parties has agreed to place his orders exclusively with the other. Here Merrill Lynch was Greenberg's sole and exclusive broker, as Merrill Lynch well knew (Rep. Tr. pp. 23-24); Greenberg *could not* take his business elsewhere for a ten day period (Rep. Tr. pp. 135-136), so that, for that period of time, Greenberg was exclusively committed to Merrill Lynch. Thus, even under Merrill Lynch's theory, "consideration" may be found.

19. **Agreed limits of 300.** Merrill Lynch charges (p. 23) us with a "particularly glaring misstatement" in stating that the parties had agreed in the trial court that Merrill Lynch had at one time agreed to accept orders up to a maximum of 300 contracts open, citing the pretrial order.

ANSWER: Appellee scores a point in noting that our reference supporting the statement was, inadvertently, to Greenberg's contentions in the pretrial order rather than to the agreed facts in the order. We are somewhat nonplussed, however, at Merrill Lynch's suggestion that the statement itself is not true. Counsel for Merrill Lynch told the jury in his opening statement, at p. 45 et seq.:

> "In March of '65, Mr. Greenberg's plans were becoming somewhat concrete, and he said, 'I think that the limits I want should amply be taken care of if you let me take up to 300 contracts open for this purpose that is going to occur very shortly.' And Merrill Lynch, feeling that the risk was not so great, as long as he put up the money for those actual sugars, they said, 'That's fine. Go ahead. We will take care of you.'"

20. **The issue of promissory estoppel.** Merrill Lynch contends (p. 24) that the issue of promissory estoppel is not properly in the case since it is not in the pleadings or pretrial order.

ANSWER: The trial court has already rejected this contention (Rep. Tr. p. 127).

21. **Expert testimony.** Merrill Lynch contends (p. 26) that Greenberg's expert witness offered no testimony of a trade custom to support Greenberg's theory and that the expert had himself terminated a customer without notice.

ANSWER: Again Merrill Lynch chooses evidence it likes and ignores the rest. In our opening brief (pp. 8-9) we detailed the testimony of the expert in support of Greenberg's theory (Rep. Tr. pp. 129-132, 136, 152). No reply whatever is made by Merrill Lynch to *that* testimony. Merrill Lynch fails, inadvertently we are sure, to note that Greenberg's expert had terminated a customer without notice *because that customer had defrauded the broker* (Rep. Tr. p. 145, l. 20-25).

22. **Limits of 300 contracts open.** Merrill Lynch claims (p. 28) that there is no evidence that the limits of 300 contracts open ever related to anything other than one specific importation into Guatemala.

ANSWER: The limits of 300 contracts open were confirmed *after* the completion of the Guatemala transaction (Rep. Tr. p. 41). The limits of 300 open were *in addition* to the Guatemala transaction (Rep. Tr. p. 87).

23. **Greenberg's evidence.** Merrill Lynch argues (pp. 29-33) that the transcript does not support certain facts recited in our opening brief.

ANSWER: Since this contention can only be answered by an examination of the record we do not

repeat our recitation here. Each of our facts is amply supported by the transcript references; Merrill Lynch's "interpretations" are not.

24. **Greenberg as an expert witness.** Merrill Lynch deprecates (p. 30) Greenberg's testimony on trade practice on the ground that he was not an "expert".

ANSWER: Merrill Lynch's present position is somewhat at variance with its position in 1963 when Greenberg became a member of the New York commodity exchange upon the recommendation of Merrill Lynch (Rep. Tr. p. 27).

25. **Findings.** Merrill Lynch states (p. 34) that we contend the court "should have made factual findings."

ANSWER: We do not so contend.

26. **"Value of the chance".** Merrill Lynch states (p. 35) that Greenberg's counsel advanced the "value of a chance" theory as the proper measure of damages, citing R. 252, 262.

ANSWER: At R. 252 Greenberg's counsel said:

> "Our position is that the damages are measured by the value of—the difference in value of orders which were actually attempted to be placed." (Rep. Tr. p. 252, l. 11-13).

Greenberg's counsel was not testifying at R. 262.

In our opening brief we cited (p. 13) *Merrill Lynch v. Miller,* 401 S.W. 2d 645 for the rule that damages are measured by the difference between cost of con-

tracts wrongfully refused and their subsequent value. That case is ignored by appellee.

27. **Speculative damages.** Merrill Lynch cites (p. 35) two Oregon cases for the rule that prospective profits which are remote and speculative cannot be allowed.

ANSWER: Involved here are not "prospective profits" but an actual loss of a specific amount, on specific orders, the value of which was exactly fixed by the market quotations for the dates in question. No estimates of any kind are involved (Ex. 75, Rep. Tr. pp. 219-224). The law in Oregon and elsewhere is that:

> "Uncertainty precluding recovery of damages relates to uncertainty whether any damages have resulted, not to damages which are the certain result of breach of contract but which are uncertain in amount." *Sol-O-Lite v. Allen,* 223 Or. 80, 353 P. 2d 843.

The law in Oregon and elsewhere is also clear that:

> "The theory of the law is to award compensation for gains prevented and for losses sustained. The party who is damaged by the breach of a contract is not prevented from recovering anticipated profits merely because they are such. If it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made, then the party committing the breach is liable for the loss of the profit." *Nelson v. Harner,* 191 Or. 359, 230 P. 2d 188.

28. **Valuation date.** Merrill Lynch states (p. 36) that "Greenberg arbitrarily selected the one day on which the contracts showed a paper appreciation".

ANSWER: The dates for valuation were fixed by the days which necessarily elapsed before Greenberg could begin trading again with another broker to protect his position (Rep. Tr. pp. 56-65, 226-227). At pretrial the court said (p. 63):

> "I don't believe though in all fairness he is just picking out a date in thin air. He is picking out a date, which the court accepts as true, the first date on which he could have purchased or dealt in the futures market."

29. **"Profit" without sale.** Merrill Lynch argues (p. 36) that no "profit" was shown by Greenberg because no actual sale occurred on the valuation date.

ANSWER: The answer is given by appellee itself on the same page (36) of appellee's brief: "A customer is entitled to withdraw money from his account when it becomes 'overmargined' by appericiation of the value of the contracts." *Each day* the customer can demand from the broker his "equity", the difference between the value of his contracts *on that day* and his margin requirements; he is *not* required to wait until "the contract has been disposed of" before he gets paid by the broker, as Merrill Lynch suggests. *Each day* the profit of the customer is computed on his then pending contracts and is payable to him *on that day,* not when "the contract has been disposed of". (Rep. Tr. pp. 14-15; Ex. 72, 73).

30. **Re-execution of order.** Merrill Lynch argues (p. 38) that no damages on a refused order can be allowed unless that order has again been placed and executed elsewhere, citing *Gurley v. MacLennan* (DC, 1900) 17 App. Cases 170.

ANSWER: The cited case does not support the statement. In our opening brief (p. 14) we cited authority to the contrary and cited the court's ruling in this case to the contrary; no reply appears in appellee's brief.

31. **Exemplary damages.** Merrill Lynch argues (pp. 41-45) that in Oregon exemplary damages *cannot* be awarded in a contract case.

ANSWER: The authorities cited by appellee hold only that exemplary damages *ordinarily* are not awarded in a contract case. At pretrial (p. 72) the trial court stated that in Oregon exemplary damages may be awarded where there is a contract in which an agent breaches a fiduciary relationship. See also *Harper v. Interstate Brewery,* 168 Or. 26, 120 P. 2d 757, for an example of an award of exemplary damages in a contract case.

32. **Fiduciary relationship.** Merrill Lynch argues (pp. 45-47) that no fiduciary relationship existed between the parties, because the duties of the broker-agent terminate upon the execution of each order to buy or sell, citing *Walston v. Miller,* 100 Ariz. 48, 410 P. 2d 658.

ANSWER: Even under appellee's theory, fiduciary relationships were violated by Merrill Lynch

because *pending unexecuted* orders were wrongfully cancelled by Merrill Lynch. (See point 15, above). Second, the *facts* in this case, as previously detailed, show the continuing duty of the broker-agent long after the execution of each order to buy or sell. (See point 16, above). Third, the law in Oregon, rather than in Arizona, is as follows:

> "As a general proposition, a broker's duty is complete, and his authority ceases, when the sale is made and the receipts therefrom fully accounted for." *Pacific Trading Co. v. Sun Ins.,* 140 Or. 314, 13 P. 2d 616.

As is strenuously argued by Merrill Lynch, in another regard in its brief (pp. 36-37) the "full accounting" does not occur, in commodity transactions, until *long after* the execution of each order to buy or sell, so that at the time in question a fiduciary relationship existed on 587 different bases, plus on the cancelled, unexecuted orders noted above.

33. **Evidence of malice.** Merrill Lynch argues (pp. 48-50) that there was no evidence of malice upon which punitive damages could be based.

ANSWER: The court would not permit the introduction of such evidence. This is the error we complain of. See our opening brief pp. 14-15. The evidence of malice that was before the court at the time of the ruling is outlined in our opening brief at pp. 19-20; we submit the same, despite Merrill Lynch's attempted explanations thereof (pp. 48-50). This court, in *Lampert v. Reynolds,* 372 F. 2d 245, 246, said:

"In reversing, we held that, on the basis of the evidence described above, the jury could have found that defendant's trespass was done knowingly and wilfully, and that it was intentional and in wanton disregard of defendant's obligations. This, we held, was sufficient to warrant allowance of punitive damages under Oregon law. The correctness of our view there stated concerning punitive damages under the law of Oregon has recently been confirmed in McElwain v. Georgia-Pacific Corporation, Or., 421 P. 2d 957, decided on December 28, 1966. The Oregon Supreme Court there held that punitive damages may be recovered '* * * whenever there was evidence of a wrongful act done intentionally, with knowledge that it would cause harm to a particular person or persons.'"

34. **Robinson-Patman claim.** Merrill Lynch argues (pp. 50-54) that the trial court did not err in refusing to permit Greenberg to assert his Robinson-Patman claims.

ANSWER: We do not feel that Merrill Lynch's reply answers the argument in our opening brief (pp. 21-29) at all, and therefore submit this point, with one further word: discovery on this claim had been pressed by Greenberg since April 15, 1966 (Cl. Tr. p. 105), shortly after the complaint was filed, and thereafter stoutly resisted by Merrill Lynch, as it admits. The claim was specifically made more than a month *before pretrial* (Cl. Tr. p. 434), when the material was finally produced by Merrill Lynch (Pre Trial Rep. Tr. p. 33). It did *not* involve any major

change in the case, as is amply shown in our opening brief.

CONCLUSION

We respectfully submit that the judgment and orders should be reversed as prayed in our opening brief.

Dated, San Francisco, California,
November 14, 1968.

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